In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted]44

No. [redacted]45

CHARLES PEYTON WEST and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF OF PETITIONERS.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles Peyton West and Maurice John West, respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision rendered November 16, 1939, reversing a decree of the United States District Court for the Northern District of Ohio, Eastern Division. *West v. American Telephone and Telegraph Co.* (1939), 108 Fed. (2d) 347 (C. C. A. 6th Circuit; Op. 135, 136 of Record). A petition for rehearing filed by your petitioners on December 15, 1939 (R. 147), was denied by the Circuit Court of Appeals on January 11, 1940. (R. 161.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The *primary question* presented by the decision of the Circuit Court of Appeals is whether the federal courts are bound by the decisions of the Court of Appeals of Ohio, whose jurisdiction is final in nearly all cases, but which is not the highest court in the state, and does not possess state-wide jurisdiction.

The question arises from protracted litigation over the loss of corporate stock.

On June 2, 1934, petitioners filed their petition in the Court of Common Pleas of Cuyahoga County, a *nisi prius* court of general jurisdiction, against respondent to recover money damages for loss of the stock in question, which loss was proximately caused by wrongful transfer of the stock by respondent; in this stock petitioners had a vested remainder interest. Upon trial, that Court rendered judgment in favor of petitioners for the value of the stock as of the time of the loss. Respondent appealed to the Court of Appeals of Ohio, the next court in the Ohio judicial hierarchy, which Court on November 9, 1936, reversed the judgment of the Court of Common Pleas, and rendered final judgment for respondent on the express ground that the action was prematurely brought, in that a demand for the return of the stock was not alleged in the petition, and "until such demand is made, no cause of action exists against the corporation." 54 Ohio Appellate 369, 7 N. E. (2d) 805, 7 Ohio Opinions 363. (R. 71.) The journal entry and mandate of the state Court of Appeals refer to its written opinion in the case for its reasons for the judgment. (R. 114.)

A motion to certify the record was filed by petitioners in the Supreme Court of Ohio and was overruled by the latter court on January 20, 1937. (54 Ohio Appellate XLIII.)

In compliance with the decision of the Court of Appeals, petitioners, on June 18, 1937, made demand on respondent for the restoration of the lost shares and mesne dividends, which demand was refused, and they thereupon filed an equity suit in the District Court, Northern District of Ohio, Eastern Division, for restoration of the stock and mesne dividends and for further relief. In he federal case the parties and the allegations of operative facts are the same as in the state court, except that the petition in the federal case contains the additional facts of demand made and refusal of the demand.

The District Court, like the state Court of Appeals, held a demand was necessary; but the Circuit Court of Appeals on appeal concluded it was not necessary, and expressly declared it was not bound by the decision of the Ohio Court of Appeals which held it was necessary; this is the decision of the Circuit Court of Appeals which petitioners ask this Honorable Court to review.

The *second question* is whether the decision of the Ohio Court of Appeals is *res judicata* on the question of demand and therefore binding on all courts, not only as a closed issue, but also because that decision created the vested right to make the demand.

A *third* is whether the conceded facts show laches on the part of the petitioners, as a matter of law.

The *fourth question* concerns the essential nature of the action.

And the *fifth* has to do with acceleration of remainders.

An understanding of these questions requires a further brief statement of the evidentiary facts, all of which are conceded:

Petitioners' father died in 1926, a resident of Cleveland, and by will bequeathed his securities, including ninety-two shares of respondent's stock, to his widow for life with a

vested remainder in petitioners. The widow was petitioners' stepmother, and also their real mother's sister.

Upon distribution of the estate in 1927, respondent, having in its possession a duly certified copy of the will, issued a new certificate for the shares, in the widow's name, but without showing on the certificate her limited interest or the remainder in the stock. The widow took possession of the certificate as life tenant, and on October 31, 1929, at the beginning of the Depression, sold the stock at the City of Boston, to Payne, Webber and Company, her stockbroker, an innocent purchaser for value, which presented the certificate for registration on respondent's books at New York, and respondent discarded the West certificate and issued a new certificate in the broker's name on November 4, 1929.

Petitioners at that time had no knowledge of the form of the certificate issued to their stepmother, nor were they at any time informed of the sale by the life tenant or by respondent. The stepmother removed to Boston after the decease of her husband and resided with a sister. One of the petitioners, Maurice John West, visited his aunts at Boston in 1930, and during this visit the stepmother's sister remarked to Mr. West that the stepmother had suffered losses in the stock market, and she (the informant) thought some of the estate securities might be gone. Maurice John West thereupon demanded of Mrs. West, his stepmother, that she show him the estate stock certificates, which she refused to do. (R. 30.)

Presently returning to Cleveland, Mr. West promptly repaired to the offices of the Cleveland Electric Illuminating Company, some of whose stock was also in the estate, and found the certificates of that stock properly evidenced the life estate. (R. 32.)

Mr. West was abashed by this finding, and concluded the suspicions must be wholly false. (R. 32.)

But early in 1934, Maurice John West heard further suspicions and wrote a letter of inquiry to the respondent,

and in respondent's reply for the first time learned that the life tenant had in fact disposed of respondent's stock, and it was transferred to a third person on November 4, 1929. Shortly after this the suit was filed in the state *nisi prius* court without having first made a demand. And, as stated, the trial court allowed full recovery, and the state Court of Appeals on appeal reversed the judgment and rendered final judgment for the respondent on the ground that the petition, failing to allege demand and its refusal, was fatally defective. The stepmother is not a party defendant although she is still in full life, and no question is raised as to defect of parties.

Petitioners claim their rights in the vested remainder were accelerated, the same as if the life tenant had died, by the sale, and by the transfer of the stock on November 4, 1929, and their rights as against respondent, for loss of the stock are to be determined as of November 4, 1929.

Respondent denies acceleration of the remainder, and claims the action is barred by the Ohio statute of limitations, and by laches.

The Federal District Court overruled all defenses, but refused acceleration of the remainder, and, since the life tenant is still living, ordered the equivalent of the lost shares to be trusteed until her decease, and the dividends on these shares to be retained by or paid to respondent until the decease of the life tenant.

The petitioners and respondent appealed from the District Court to the Circuit Court of Appeals under separate appeals numbers, namely, Nos. 8140, 8141. But both appeals deal with the same case and one record was filed for both appeals. The Circuit Court of Appeals, entertaining the view, as above shown, that demand was not necessary, and that the decision of the state Court of Appeals was not binding on it, held that the action is barred by the statute of limitations; and held, further, that the action is barred by laches.

GROUNDS FOR GRANTING THE WRIT.

The writ of certiorari is accordingly sought on the grounds—

First, that the federal courts are obliged to follow the law of Ohio, as declared by its Courts on the question of demand, which the Circuit Court of Appeals failed to do. This ground involves two aspects—That the Court of Appeals of Ohio is a court of such dignity that its decisions bind the federal courts; and, also, that the Circuit Court of Appeals misconceived the decisions of the Supreme Court of Ohio on the question of demand in other cases.

Secondly, that the decision of the state Court of Appeals that demand is necessary, is *res judicata* on that issue; and that it also created a vested right in petitioners whereof they were deprived by the decision of the Circuit Court of Appeals.

Third, that the Circuit Court of Appeals failed to follow the law, as declared by the Supreme Court of Ohio, on the doctrine of laches.

Fourth, that the Circuit Court of Appeals erroneously assumed the action was *ex delicto,* and applied the statute of limitations governing tort actions, whereas the action is *ex contractu* and other statutes apply.

And *Fifth,* that by the sale and wrongful transfer of the stock, the acceleration of their rights in remainder was precipitated, and respondent, which is responsible for the sale and transfer, must answer to petitioners for the loss of the stock as if the life tenant had died and they therefore had by her death become absolute owners.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and transmit to this Honorable Court a full and complete transcript of the record of said cause numbered and titled on its docket as:

"Charles Peyton West and Maurice John West, Appellants, v. The American Telephone and Telegraph Company, Appellee. Plaintiffs' Appeal No. 8140; Defendant's Appeal No. 8141," and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners be granted such other and further relief as they may be entitled to under the facts and law.

Respectfully submitted,

ORLIN F. GOUDY,
HARRY L. DEIBEL,
Attorneys for Petitioners.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS.

The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2d) 347; also on page 136 of the Record.

The opinion of the federal District Court was not reported, but is found in full at p. 116 of the Record. The findings of fact and conclusions of law of the District Court are given in full on p. 121 of the Record.

And the opinion of the Ohio Court of Appeals is reported in 54 Ohio Appellate 369, 7 Ohio Opinions 363, 7 N. E. (2d) 805. (R. 71.)

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended. (28 U. S. C. A. Sec. 347.)

The judgment of the Circuit Court of Appeals was entered on November 16, 1939 (R. 135, 136) and the petition for rehearing was denied on January 11, 1940. (R. 161.)

ARGUMENT.

The facts have been pleaded in the foregoing petition for the writ, and are not here repeated.

I. The Federal Circuit Court of Appeals Should Have Followed the Ruling of the State Court of Appeals on the Issue of Demand.

The Constitution of Ohio provides in part in Article IV, Sec. 6:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify, or reverse the judgments of the court of common pleas, * * * and other courts of record within the district * * * and judgments of courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States, or of this state, * * * and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. * * * and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

The jurisdiction of the Ohio Court of Appeals is fixed by this constitutional provision, and no statute can enlarge or abridge it. *State v. Wallace* (1923), 107 O. S. 557, 140 N. E. 305.

It is a court of such dignity that its decisions are final, with the exceptions enumerated. In the vast majority of cases, it is in fact the court of last resort in the state, and should therefore fall within the scope of the rule announced in *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

Assuming it were only an intermediate court, still, until the highest court has spoken, its pronouncements are to be followed by the federal courts. *Ruhlin v. N. Y. Life Ins. Co.* (1938), 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860; *Blair v. Commissioner* (1937), 300 U. S. 5, 81 L. Ed. 465, 57 S. Ct. 330; *Erie R. R. Co. v. Hilt* (1918), 247 U. S. 97, 62 L. Ed. 1003, 38 S. Ct. 435; *Hack v. American Surety Co.* (1938), 96 Fed. (2d) 939, at 946 (C. C. A. 7th).

However, it is clear that the Ohio Supreme Court has spoken, and shareholders are required to make demand before suit in that state where they pray for recognition as owners of stock and ask for dividends, as petitioners did in the bill in the District Court. *Steverding v. Cleveland Cooperative Stove Co.* (1929), 121 O. S. 250, 167 N. E. 883; *Railway Co. v. Robbins* (1880), 35 O. S. 483.

The instant case vividly demonstrates the travesty flowing from a rule which would give the federal courts free reign: The state Court of Appeals held no cause of action accrued until a demand was made, and entered judgment against the plaintiffs for that reason. The federal Court of Appeals held the cause of action accrued at the original transfer to the life tenant in 1927 (R. 141), without a demand, and entered judgment against the plaintiffs for that reason. The parties are crushed between the upper and nether millstones.

II. The Holding of the State Court of Appeals on the Issue of Demand is Res Judicata and Therefore is Binding on All Courts, and the Right of Action Created by the Decision is a Vested Right Securely Citadelled as Against the Federal Courts by the Due Process Clause of the Fifth Amendment to the Federal Constitution.

Whether right or wrong the decision of the state Court of Appeals that a demand is prerequisite to a right of action, is final and conclusive. Even if it were true that the federal courts are not required to follow the law as promul-

gated in *other* cases by inferior state courts, they must necessarily follow the final adjudications of the state courts on the self-same issue between the self-same parties. *Freeman on Judgments* (5th Ed.), Sections 708, 709, 739, 1467; *Deposit Bank v. Frankfort* (1903), 191 U. S. 499, at 510, 48 L. Ed. 276, 24 S. Ct. 154; *Mitchell v. First National Bank of Chicago* (1901), 180 U. S. 471, at 481, 45 L. Ed. 627, 21 S. Ct. 418; *Southern Pacific Railroad v. United States* (1897), 168 U. S. 1, at 48, 42 L. Ed. 355.

This point is completely ignored by the Circuit Court of Appeals.

Not only is a final judgment on an issue *res judicata* estopping the parties from relitigating that issue, but also the rights created or recognized by the judgment are vested rights immune from attack or impairment anywhere and everywhere. *Merchants of Danville v. Ballou* (1899), 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

III. The Law of Laches as Laid Down by the Supreme Court of Ohio Was Misconceived by the Circuit Court of Appeals.

That law is that lapse of time is not enough to constitute the defense of laches, as indicated by the Circuit Court of Appeals, but, in addition, plaintiffs must have actually known of the cause of action, and the defendant must have changed his position to his prejudice. No evidence of prejudice was offered. *Russell v. Fourth National Bank* (1921), 102 O. S. 248, 131 N. E. 726; *Harris v. Wallace Mfg. Co.* (1911), 84 O. S. 104, 95 N. E. 559; *Crist v. Dice* (1869), 18 O. S. 536.

Admittedly, where demand is prerequisite to a cause of action, plaintiff may be barred by excessive dilatoriness in making that demand.

But the Circuit Court of Appeals cites *Keithler v. Foster* (1871), 22 O. S. 27, as holding that demand is required to be made within the period of that statute of limita-

tions which prescribes the interval within which the respective action is to be filed after the cause of action accrues. But plainly that is not what the case holds. The court thus summarizes its views in that case in the second syllabus:

> "Such demand, however, must be made in a reasonable time, and, if no cause for delay is shown, should be made at least within the time limited by the statute for bringing the action; and, in the absence of special circumstances, if no demand be shown within that time, it will be presumed to have been made at the expiration of that period, so far as regards the statute of limitations."

The rule therefore is "a reasonable time," and what "a reasonable time" may be, depends on the circumstances of each case. *Keithler v. Foster, supra,* at p. 31.

Obviously, in the instant case, the lapse of time from and after the filing of the suit in the state court on June 2, 1934, cannot be counted. Maurice John West heard a suspicion in 1930, that some of the stocks were gone. He investigated one of the other stocks and found that properly issued. Is a court of equity to require more than that under the circumstances? Respondent is itself necessarily charged with notice of the wrongful transfer, and of the destruction of petitioners' property, because it had a copy of the will which created their rights. But it did not communicate to the petitioners the fact known to it of the loss of their property, of which fact petitioners were wholly ignorant.

The Circuit Court of Appeals expresses the view that especially in equity was it the duty of petitioners to make demand before it was made. For the court observes, in its opinion (R. 142), referring to the duty to make demand within the period of the statute of limitations after the first wrongful transfer in 1927:

> "This rule is peculiarly applicable where, as here, the plaintiffs have filed a bill in equity."

Where, indeed, are the equities in this case?

Is not the exact converse of the view of the Circuit Court the only sound equity? If the Circuit Court is right in its view, then the respondent is to be blessed for its own wrong by a court of equity—an utterly impossible position.

IV. The Action is Ex Contractu and is Not Barred by Any Statute of Limitations.

The Circuit Court of Appeals tacitly proceeds on the assumption that the action sounds in tort, and therefore applies Section 11224, General Code of Ohio. (R. 141.) However, according to the best authorities it is an *ex contractu* action. *Fletcher on Corporations* (Perm. Ed.), Section 5538; *Travis v. Knox Terpezone Co.* (1915), 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387. Actions for breach of oral contracts must be filed within six years after the cause of action accrued, and of written, within fifteen years. Sections 11221 and 11222 General Code of Ohio. The cause of action could not have accrued until the loss in 1929. *Marbury v. Ehlen* (1890), 72 Md. 206; *Baker v. Atlantic Coast Line Railroad Company* (1917), 173 N. C. 365. And upon failure otherwise than on the merits in 1936 at the hands of the state Court of Appeals, petitioners had one year within which to file a new case under favor of Section 11233 General Code of Ohio. They did in fact file the action in the federal District Court within nine months of such failure. Therefore, even if no demand was necessary and if the action is *ex contractu*, it is not barred by any statute of limitations.

V. The Unauthorized Sale of the Stock by the Life Tenant Terminated Her Life Estate, and Accelerated All Rights In, and Accruing From, the Stock to the Remaindermen as of the Time of the Sale. And the Sale, Having Been Made Possible, by Wrongful Acts of Respondent, Is to be Laid at Respondent's Door, as of the Time it Recognized the Sale, Discarded the West Certificate and Issued a New Certificate to a Third Person.

Since the tortious sale was in Massachusetts, the legal consequences of it flow from the law of that state. *Dennick v. Railway Co.* (1880), 103 U. S. 11, 26 S. Ct. 439.

By the law of Massachusetts a sale by a life tenant of personalty wherein the life estate exists, accelerates the remainder. *Leonard v. Stickney* (1881), 131 Mass. 541, at 545; *Phillips v. Allen* (1863), 89 Mass. 115.

Where the subject-matter of the life estate is stock and the corporation issues its stock certificate to the life tenant with knowledge of the remainder, but without evidencing it on the certificate, and the life tenant tortiously sells it, the corporation "is as fully liable as if it had shared in the profits of the transaction." Chief Justice Taney in *Lowry v. Bank* (1848), Taney's Opinions, 310 Fed. Cases, No. 8,581. See, also, *Western Union Telegraph Co. v. Davenport* (1878), 97 U. S. 369, 24 L. Ed. 1047; *Moores v. Bank* (1884), 111 U. S. 156, 28 L. Ed. 385; *St. Romes v. Levee Steam Cotton Press Co.* (1887), 127 U. S. 614, see Syllabus 3; *Loring v. Salisbury Mills* (1878), 125 Mass. 138, at 150.

SUMMARY.

The decision of the state Court of Appeals that demand is prerequisite to suit, is to be regarded as final and conclusive for these reasons: The federal courts are obliged to follow the law of the states; the state Court of Appeals declares the law of the state; in such cases demand is required by the Ohio Supreme Court; and the ruling is *res*

judicata, creating a vested right. In holding demand unnecessary, the Circuit Court of Appeals committed error.

No laches can be charged against petitioners. Laches is an equitable defense and cannot be relied on in Ohio unless the respondent was prejudiced by the delay. To say that respondent was prejudiced in the case at bar is to heap rewards on its own wrong. The Circuit Court of Appeals misconceived the state law on this point.

The action is *ex contractu* and is not barred by the Ohio statutes of limitation.

Not only are petitioners entitled to have the lost stock restored as remaindermen, but are to be treated as the absolute owners of it as of the time of the sale, and respondent is answerable as of the time it issued a new certificate to a third person with knowledge of petitioners' rights in remainder, but in disregard of such rights. Under the law the sale by the life tenant accelerated the remainder, of which law respondent is charged with full knowledge.

Respectfully submitted,

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